NO. 82-1037

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LONN A. TROST,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. WHERE AN OUT OF STATE RESIDENT MAKES AFFIRMATIVE FRAUDULENT REPRESENTATIONS IN A COMMERCIAL TRANSACTION TO A CALIFORNIA RESIDENT WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE THE CALIFORNIA RESIDENT TO PERFORM ACTIONS IN CALIFORNIA, AND WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE DAMAGE IN CALIFORNIA, IS IT CONSTITUTIONAL, REASONABLE AND FAIR TO REQUIRE THE INTENTIONAL TORTFEASOR TO DEFEND IN THE STATE WHERE HE INTENDED HAS MISFEASANCE TO BE EFFECTIVE?
2. DOES CALIFORNIA LAW PROVIDE FOR AN EVIDENTIARY HEARING PROVIDING FOR DUE PROCESS OF LAW REGARDING THE FACTS ON WHICH JURISDICTION RESTS OR, AS APPELLANT ASSERTS, IS JURISDICTION EXERCISED ON THE "MERE ALLEGATION" OF FRAUD?
3. DOES A SUBSEQUENT GENERAL APPEARANCE IN THE SUPERIOR COURT BY APPELLANT WHICH WAIVED HIS JURISDICTIONAL OBJECTION RENDER THE INSTANT APPEAL MOOT?

4. DOES AN APPEAL LIE TO THIS COURT WHERE THE OBJECTION RAISED BELOW WAS THAT THE CONSTITUTION DID NOT PERMIT THE EXERCISE OF JURISDICTION BY CALIFORNIA AND NOT THAT A STATUTE WHICH IS COEXTENSIVE WITH THE FEDERAL CONSTITUTION WAS UNCONSTITUTIONAL AS APPLIED?

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SECOND APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

Real Party in Interest Manuel F. Rothberg moves that the appeal be dismissed or in the alternative be summarily affirmed.

STATEMENT OF THE CASE

1. Mr. Rothberg, a California resident, sued the Appellant in California because the Appellant intentionally made fraudulent misstatements to Mr. Rothberg which were intended to and did induce Mr. Rothberg to perform major actions in California, and to incur damages in California.

2. Appellant moved to quash the action against him in California on the basis of lack of jurisdiction, not on the basis of the unconstitutionality of the California jurisdictional statute.

3. An evidentiary hearing was held in the California Trial Court, and based on long established law, and on the facts found after hearing by the Trial Court, the motion to quash was denied.

4. Appellant then filed a Petition for Writ of Mandate to the California Court of Appeal. The Petition was considered and denied by the Court of Appeal.

5. Appellant sought a hearing thereon in the California Supreme Court. The request was considered and denied by the California Supreme Court.

6. Appellant then twice sought a stay of proceedings in the California Trial Court; twice the request was considered and twice denied.

7. After Appellant filed a Notice of Appeal from the decision of the Court of Appeal he also sought a stay of proceedings in the Court of Appeal. T[illegible] request was considered and denied.

8. Appellant then applied for an Emergency Stay from Mr. Justice Rehnquist wherein Appellant asserted that

unless the stay was granted he would have to make an appearance in California thereby causing him to lose his ability to object to jurisdiction in California (pp. 6:26-7:1; 7:28-8:7). The stay was denied on October 27, 1982. (Case No. A-369)

9. On October 29, 1982, Appellant served and filed an Answer in the Superior Court. He concedes the filing of an Answer on page 9 of the Jurisdictional Statement.

10. In his Jurisdictional Statement, as he had done in this Court in his Application for Stay, in the California Supreme Court, in the California Court of Appeal and in the California Trial Court, Appellant ignores the real facts and makes self-serving statements which he then attempts to elevate into facts. If Appellant's "facts" were the true facts, the results might have been different in the Courts Below, but they are not anywhere near the true facts, as the Courts Below could and did easily determine from the record and the evidence presented to them.

11. The verified answer to the Petition for Writ of Mandate in the California Court of Appeal and the verified cross-complaint in the Trial Court set forth the true facts. Real Party in Interest Manuel F. Rothberg was the president of W. & J. Sloane of Beverly Hills. Sloane is a wholly-owned subsidiary of Beck Industries, Inc. Beck has been in bankruptcy reorganization for twelve years. Appellant was Beck's Trustee's attorney. Mr. Rothberg was promised by *Appellant* that he would receive 10% of the gross proceeds of a Sloane going out of business sale if he would conduct such a sale in California. That promise was first discussed in a telephone call by *Appellant* to Mr. Rothberg in California and then made at a meeting with the *Appellant* in New York City. At that meeting, *Appellant* affirmatively represented to Mr. Rothberg that the

agreement need not be reduced to writing because the 10% of the gross proceeds agreement would be contained in an application to the Federal Bankruptcy Court.

12. The Bankruptcy Application was then prepared and mailed by *Appellant* to the Bankruptcy Court and to Mr. Rothberg and it also affirmatively represented, *now in writing*, that Mr. Rothberg would receive 10% of the "net profit." The text of paragraph 7 of the Application is set forth in Appendix A hereto.

13. The Trustee, Mr. Kirschenbaum, [1/] in writing, then appologized to Mr. Rothberg for the error of referring to "net profit" and indicated that Appellant would correct this error. The text of the telegram so stating is set forth in Appendix B hereto.

14. *Appellant* then wrote to the Bankruptcy Court, copied to Mr. Rothberg, and corrected the error by affirmatively representing to the Bankruptcy Court and Mr. Rothberg that Mr. Rothberg was to receive 10% of the "gross proceeds" not 10% of the "net profit." These representations to the Bankruptcy Court are not mere documents filed with the Bankruptcy Court but written memoranda of the agreement and affirmative representations by *Appellant* to Mr. Rothberg setting forth precisely what the agreement was. The text of the letter by Appellant to the Bankruptcy Court is set forth in Appendix C hereto.

15. Mr. Rothberg, in California, then, and in intended reliance on these oral and written representations of *Appellant*, spent over two months conducting the going out of business sale.

[1/] The Trustee is also a cross-defendant. He was ordered by the Bankruptcy Court to submit to jurisdiction in California.

16. When over $8,000,000 had been received by Sloane, and much of the profit transferred to New York, Appellant suddenly repudiated the agreement — set forth in black and white in documents filed by Appellant in the Bankruptcy Court — by contending that a flat sum of $250,000 had been agreed to, not the 10% of the gross proceeds for which there is objective evidence over Appellant's own signature.

17. That *Appellant* represented to Mr. Rothberg that he would receive 10% of the gross proceeds is clear and irrefutable; indeed it is the subject of judicial notice of the Bankruptcy Court files. By contending that in spite of the clear, unambiguous language of the Application and letter that nevertheless the agreement was that Mr. Rothberg would receive a flat $250,000, and the flat fee antedates the Application and letter then, *a fortiari*, Appellant establishes that there was no intent to honor the 10% of the gross proceeds representations when they were made. That is fraud.

18. Mr. Rothberg makes three main arguments in support of his motion to dismiss or summarily affirm: (1) A discussion of the merits of the minimum contact claim; (2) a discussion of the California procedures used to determine the case and Appellant's attempt to have Appellate Courts reweigh the facts; and (3) a discussion of the reasons why the matter should be dismissed, including mootness.

ARGUMENT

1. MOTION TO AFFIRM

A.

WHERE AN OUT OF STATE RESIDENT MAKES AFFIRMATIVE FRAUDULENT REPRESENTATIONS IN A COMMERCIAL TRANSACTION TO A CALIFORNIA RESIDENT WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE THE CALIFORNIA RESIDENT TO PERFORM ACTIONS IN CALIFORNIA AND WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE DAMAGE IN CALIFORNIA, IT IS CONSTITUTIONAL, REASONABLE AND FAIR TO REQUIRE THE INTENTIONAL TORTFEASOR TO DEFEND IN THE STATE WHERE HE INTENDED HIS MISFEASANCE TO BE EFFECTIVE

The basis of Appellant's Jurisdictional Statement consists in essence of:

1. A bald, incorrect assertion that the basis of the rulings of the Courts Below was that jurisdiction is automatically obtained by "a mere allegation" of fraud, an assertion which Mr. Rothberg interprets as an unarticulated challenge that California procedural law violates Due Process of Law; and
2. A bald, incorrect assertion that jurisdiction is based on purported specious allegations that an

> attorney entered into a conspiracy because of the attorney's self proclaimed conclusion — ignoring the facts — that all he did was provide legal representation to his client.

The facts are that *Appellant* himself affirmatively represented to Mr. Rothberg that Mr. Rothberg would receive 10% of the gross proceeds of the sale and that the agreement would be reduced to writing in the form of the Application to the Bankruptcy Court, and that *Appellant* himself affirmatively represented in the Application and letter — sent to Mr. Rothberg — that 10% of the gross proceeds was the agreement. As discussed in the following section, the Trial Court held an *evidentiary hearing* and the intendments in this proceeding, as they always are in an Appellate Court, are that the Courts Below found the facts to be those favorable to their decisions, not the version argued by Appellant. It is elementary that Appellate Courts review errors of law and do not reweigh the evidence, and a proper argument to an Appellate Court weighs the facts accordingly.

The entire appeal is premised upon ignoring the true and determined facts regarding Appellant's actions and blatantly asserting as a given fact that the "only" thing Appellant did was give legal representation to his client [2/] and that he made none of the representations which the Courts Below found he made. That kind of appeal does not effectively challenge the constitutionality of the California statute "as applied" and does not raise a substantial Federal question on appeal. The function of appeals to this Court is not to reweigh the evidence. Because we believe that Appellant is merely rearguing the evidence and that this does not present a substantial Federal

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[2/] It is axiomatic under the substantive law of agency that even if he were an agent, and he committed a tort in the course and scope of his agency, he is still legally accountable for his own torts.

question, we discuss the motion to affirm first so the Court may understand the issues which Appellant declines to discuss.

The question is if a sister state resident makes affirmative, fraudulent representations in a commercial transaction to a California resident which are intended to cause and which cause the California resident to perform actions in California and are intended to cause and which cause damage in California, is it reasonable and fair to require the intentional tortfeasor to defend in the state where he intended his misfeasance to be effective?

The answer is that it is constitutional, fair and equitable for California to exercise jurisdiction where "the conduct charged is an intentional and malicious tort" against a forum-based victim.

> ". . . It is just as reasonable and fair, and maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when that defendant has sought or anticipated economic benefit in that state from its out-of-state activities."
> ***Abbott Power Corp. v. Overhead Electric Co.*** (1976) 60 Cal.App.3d 272, 281-282, 131 Cal.Rptr. 508.

In ***Abbott***, the victim was a California-based corporation; here we have an individual who is even more deserving of the benefits of the long arm statutes.

The statutory basis for California's exercise of jurisdiction is California Code of Civil Procedure Section 410.10:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

California and federal courts have interpreted this statute as permitting the exercise of jurisdiction to the fullest extent possible limited only by the Due Process clause of the Fourteenth Amendment of the United States Constitution. ***Michigan Nat. Bank v. Superior Court*** (1972) 23 Cal. App.3d 1, 6, 99 Cal.Rptr. 823. Certainly since the state exercised jurisdiction there is no independent state constitutional issue.

The Ninth Circuit Court of Appeals also recognizes that there is a material difference as to the level of state interest and the level of minimum contacts for jurisdictional purposes when there is an intentional tort intended to cause damage in a particular state. In ***Data Disc, Inc. v. Systems Tech Assoc., Inc.*** (9th Cir., 1977) 557 F.2d 1280, the Court had no difficulty in distinguishing between an intentional and non-intentional tort, and in a fraud situation finding sufficient minimum contacts under ***Abbott Power, supra*** and ***Hanson v. Denckla*** (1958) 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

This Court reviewed the California statute in ***Kulko v. Superior Court of California, etc.*** (1978) 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132. It correctly noted that California follows the "effects test" of the Restatement, referring to the "shoot the bullet" example of the Restatement. 436 U.S. at 96.

Appellant herein never articulates the true issue, nor does he seem capable of upholding his side of the issue in argument before this Court. The standard of minimum contacts and fundamental fairness is not in dispute. The question is

what level of minimum contacts comport with fundamental fairness when there is an intentional tort in a business transaction.

Citing cases such as ***World-Wide Volkswagon Corp. v. Woodson*** (1980) 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490, a products liability case, does not address the questions. What constitutes sufficient minimum contacts in a products liability case is of no help in deciding what is reasonable regarding the instant intentional tort. Nor does citing ***Los Angeles Airways, Inc. v. Davis*** (9th Cir., 1982) 687 F.2d 321 have anything to do with the case. ***Davis*** was a diversity case which discussed California substantive law regarding the privilege of an attorney to advise his client as a defense to a suit for inducing breach of contract. It is not a jurisdiction case and this Court does not ordinarily review California common law tort actions regarding the correctness of theories under California common law tort law.

In the Courts Below Appellant framed his declarations and argument to try and bring himself under ***Demarest v. Superior Court*** (1980) 103 Cal.App.3d 791, 165 Cal.Rptr. 641, a child custody case where mere advice by an attorney did not confer jurisdiction. ***Demarest*** involved an entirely different type of tort, an entirely different type of factual setting, different policy issues and an absence of the direct, tortious contact between the tortfeasor and the victim involved herein, all of which Appellant chooses to ignore.

On December 15, 1982, the California Court of Appeal once again reiterated that there is a different level of sufficient minimum contacts when there is an intentional tort intended to and causing damage in California. ***Jones v. Calder*** (1982) ____Cal.App.3d____ , ____Cal.Rptr.____ (2d

Civil No. 65403). [3/] The actress, Shirley Jones, sued the National Enquirer and its editor, Mr. Calder, for defamation, invasion of privacy and intentional infliction of emotional distress. Calder moved to quash for lack of sufficient minimum contacts and the motion was granted. The Court of Appeal, in a decision by Justice Lillie, reversed.

At page 13 of the slip opinion the Court states:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein."

The Court goes on to quote, discuss and follow ***Abbott Power, supra.***

In this case, Appellant blithely argues from his version of the facts and never touches on the real issue of whether the facts favorable to the judgment are sufficient minimum contacts when there is an intentional tort intending to and in fact causing effects and damages in California in a commercial transaction. ***Abbott Power, supra,*** contains a concise statement of a rule which permits the exercise of jurisdiction by California and Appellant does not deign to discuss it.

[3/] The decision is still subject to review by the California Supreme Court.

There is no denial of due process in perceiving that the minimum contacts are different for an intentional tort and under the facts of this case it is entirely reasonable for California to exercise jurisdiction over the intentional tortfeasor. An intentional tortfeasor such as Appellant can reasonably anticipate that he will be haled into court where he intends to and in fact causes damage; the converse states an unreasonable proposition which gives an unfair advantage to the intentional tortfeasor.

B.

CALIFORNIA PROCEDURES FOR DETERMINING JURISDICTION COMPORT WITH DUE PROCESS; APPELLANT HAS MISSTATED THE FACTS AND IGNORED THE SUBSTANCE AND EFFECT OF THE PROCEDURES BELOW; HE IS SEEKING A REWEIGHING OF THE EVIDENCE BY THIS COURT AND IS ARGUING FROM THE FINDINGS OF FACT HE WANTS THIS COURT TO MAKE

The procedural posture of this case is that Appellant made a motion to quash pursuant to California Code of Civil Procedure Section 418.10. The section is set forth in Appendix D. Upon denial of the motion he filed a Petition for Writ of Mandate as authorized by that section; California does not permit interlocutory appeals and this is a statutory means of right to obtain appellate review. Upon denial of the Petition, he sought a discretionary hearing in the California Supreme Court which was denied.

In *Data Disc, supra*, the Ninth Circuit went to great lengths to discuss how the affidavits are treated in that Circuit, holding that different standards are applied according to the stage of the proceedings at which the jurisdictional objection is made. The Ninth Circuit, at least at the initial stage, does not weigh the evidence submitted by affidavit.

In California, a motion to quash is an evidentiary hearing. Where a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. Evidence of those facts or their absence may be in the form of declarations with the verified complaint being treated as a declaration for that purpose. [4/] The parties have the right to engage in discovery regarding the issues raised on the motion to quash without it constituting a general appearance. The Trial Court has discretion to hear live evidence. Where there is a conflict in the declarations, resolution of the conflict by the Trial Court will not be disturbed on appeal if the determination of that Court was supported by substantial evidence. Resolutions of factual disputes by the Trial Court where the evidence is by declaration are treated exactly in the same manner as if there were live testimony. The Appellate Court does not disturb the implied findings of the Trial Court in support of its order. The Appellate Court does not consider evidence not before the Trial Court and on motion such evidence may be stricken. *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619-620, 284 P.2d 1; *1880 Corporation v. Superior Court* (1962) 57 Cal.2d 840, 22 Cal.Rptr. 209, 371 P.2d 985; *Mission Imports, Inc. v. Superior Court*

[4/] An affidavit is not required; California Code of Civil Procedure Section 2015.5 is equivalent to 28 U.S.C. Section 1746.

(1982) 31 Cal.3d 921, 184 Cal.Rptr. 296, 647 P.2d 1075, at F.N. 5; ***Thomas J. Palmer, Inc. v. Turkiye Is Bankasi*** (1980) 105 Cal.App.3d 135, 145-146, 164 Cal.Rptr. 181; ***Reifler v. Superior Court*** (1974) 39 Cal.App.3d 479 483-484, 114 Cal.Rptr. 356; ***Arnesan v. Raymond Lee Organization, Inc.*** (1973) 31 Cal.App. 3d 991, 994-995; 107 Cal.Rptr. 744; ***Atkins, Kroll & Co. v. Broadway Lumber Company*** (1963) 222 Cal.App.2d 646, 654, 35 Cal.Rptr. 385.

Clearly Appellant's assertion that California exercises jurisdiction on the "mere allegation" of fraud in a complaint is specious. There was an evidentiary hearing in the matter. [5/] It was according to these rules that the Court of Appeal considered the Petition for Writ of Mandate and denied it. Unless this Court promulgates a new rule equivalent to the independent review of the record in First Amendment cases, the facts and inferences drawn from the record which will be reviewed by this Court are those that support the judgment. In the Court of Appeal and the California Supreme Court the Appellant has continually attempted to argue his version of the facts and in effect obtain a new factual determination from the Appellate Courts. Now he has attempted to obtain a stay and obtain review by this Court by once again improperly giving his biased version of the facts. While Mr. Rothberg insists his

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[5/] The Trial Court also read Appellant's deposition, but Appellant did not include it as part of the record in the Mandate Petition. Appellant was represented in Los Angeles on his special appearance by the same attorneys representing the plaintiff and other cross-defendants. Counsel attempted to obtain an injunction freezing Mr. Rothberg's assets wherein they attempted to prove their version of the agreement. There were five hearings before the same judge who heard the motion to quash. At the last hearing, after the motion to quash, the judge denied the preliminary injunction, indicating in his comments that he disbelieved the version of the evidence which is also being advanced by Appellant herein.

version of the facts is true, what is more important is that they have been found to be true by the Trial Court. That is no surprise because Mr. Rothberg's and the Trial Court's version are consistent with the agreement set forth in writing in the Bankruptcy Court while Appellant is impeaching his own written representations.

The bottom line is that this is an appeal based on sufficiency of the evidence without findings of fact and conclusions of law, and Appellant is attempting to obtain a review by misrepresenting the facts which are properly before an Appellate Court and arguing therefrom. That is not appropriate. There is no constitutional defect in California's procedure for determining jurisdiction by means of an evidentiary hearing and providing for interlocutory review by the Appellate Courts.

2. MOTION TO DISMISS

A.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

From the foregoing discussion of the facts and the merits it is clear that the question sought to be framed and raised by Appellant is devoid of merit and does not raise a substantial Federal question. Rather than reargue the prior discussion on the merits, we incorporate it herein as a basis for dismissal for lack of a substantial Federal question.

B.

THE CASE IS MOOT

Appellant filed an answer in the Superior Court. He conceded in his ex parte application for a stay to Mr. Justice Rehnquist that the matter would be moot unless a stay were granted. Appellant now ignores his prior representation. We choose not to ignore it and respectfully submit that the subsequent filing of an answer and submission to jurisdiction in California makes the instant proceeding moot.

In his stay application, at pages 6-8, Appellant argued that under California law if Appellant answered he would waive his jurisdictional objection, citing *Neihaus v. Superior Court* (1977) 69 Cal.App.3d 340, 137 Cal.Rptr. 905, and *Terzich v. Medak* (1978) 78 Cal.App.3d 636, 144 Cal.Rptr. 323. We believe that to be a correct statement of California law; Appellant is right, he has waived his claim by filing a general appearance, and the instant appeal is moot.

C.

NO APPEAL LIES FROM THE INSTANT JUDGMENT

Appellant argues that the instant judgment is reviewable on "appeal" rather than certiorari because he challenges the constitutionality of California Code of Civil Procedure §410.10 as applied.

In his Jurisdictional Statement Appellant states the true fact:

> ". . . in his Memorandum of Points and Authorities in support of his Motion to Quash Service of Summons, appellant raised the claim that the exercise of personal jurisdiction over him would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."
>
> Jurisdictional Statement, pp. 3-4.

Simply put, in the Courts Below Appellant moved to quash on the grounds that the Due Process Clause precluded the exercise of jurisdiction over him, not on the ground that the long arm statute was unconstitutional as applied. Under ***Kulko v. California Superior Court, supra,*** 436 U.S. at 90, and including footnote 4, Appellant's remedy is certioriari, not appeal. The motion to quash was made on the ground that the Constitution itelf would not permit the exercise of jurisdiction, not on the unconstitutionality of the statute. Appellant is trying to introduce a new theory, perhaps in response to the suggestion of some commentators that there is a greater statistical chance of a hearing being granted by this Court for an appeal or that on appeal this Court may review the merits while it might not on certiorari. While we recognize that the result of a dismissal on this basis may result in the Court treating the Jurisdictional Statement as a Petition for Certiorari — a result which encourages litigants such as Appellant to take a free shot at an appeal even while citing the case which says no appeal lies — nevertheless under ***Kulko, id.***, and more recently ***Crawford v. Los Angeles Board of Education*** (1982) ____U.S.____, 102 S.Ct. ____, 73 L.Ed.2d 948, we do not see how a constitutional challenge can be made

to a statute which adopts the standards of the Constitution itself, nor how it was raised below in this case. Treated as an appeal, this appeal should be dismissed.

3. MISCELLANEOUS

As he has done in each preceding Court and in the stay application in this Court, Appellant refers to a purported statement made to Judge Ryan in New York that Appellant was sued because he would not appear for deposition. This allegation was denied in the Answer to the Petition for Writ of Mandate; it is not true. Logically, the underlying need for a suit in California to compel a deposition is spurious. California Code of Civil Procedure Section 2024 provides for taking the deposition of out of state witnesses. Legally, the assertion has nothing to do with the jurisdictional issue. No authority is now, nor has any ever been, cited connecting these purported facts to jurisdiction. If it has any relevance to the instant issues, it was impliedly found not to be true by the Trial Court. It is a blatant attempt to prejudice this Court with an irrelevancy. We have challenged Appellant to justify this remark in the Appellate Courts Below and in this Court; he has not, yet he continues to try to prejudice each Court with its use.

CONCLUSION

The legal standards for the exercise of jurisdiction by California are those governing intentional torts in commercial transactions. Appellant has grossly misrepresented the facts properly before the Court in an effort to obtain a hearing. There is no credible attack on the California procedure. The facts which support the order appealed from (the true facts) are as asserted by Mr. Rothberg and found to be true by the Trial Court. And Appellant has filed an answer and the instant appeal is moot.

WHEREFORE Real Party in Interest Manuel F. Rothberg prays that the instant appeal be dismissed or affirmed, and if treated as a Petition for Writ of Certiorari, the Petition be denied.

Dated: January 17, 1983.

Roger P. Heyman, Esq.
Stuart L. Brody, Esq.

VALENSI AND ROSE, PLC

By: Stuart L. Brody
Attorneys for Real Party in
Interest, Manuel F. Rothberg

APPENDIX A

Paragraph 7 of Application to Bankruptcy Court

7. In conjunction with the instant sale, as well as Beck's plan of liquidation, it will become necessary and appropriate to liquidate Sloane's inventory. Therefore, at this time Applicant seeks the authorization of this Court, upon approval of the Agreement, to liquidate Sloane's inventory in a manner consistent with the terms of the Agreement. Applicant believes it would be in the best interests of the estate herein and its creditors, if the liquidation were to be conducted under the supervision and control of Emanuel Rothberg, who is currently president of Sloane. For his services in connection with the liquidation of the Sloane's inventory, applicant proposes to pay to Mr. Rothberg 10% of the net profit, which applicant believes is reasonable, considering Mr. Rothberg's knowledge of the furniture business and his familiarity with the Sloane's entire operation. Applicant believes that this would be the least expensive and most expeditious method of liquidating Sloane's inventory.

APPENDIX B

Telegram from Trustee to Mr. Rothberg

January 4, 1982

MANUEL F. ROTHBERG
W AND J SLOANE
9568 WILSHIRE BOULEVARD
BEVERLY HILLS, CA 90212

DEAR MANNY:

ON THE APPLICATION ON SLOANE'S BY THE TRUSTEE PAGE 3 PARAGRAPH 7 CONTAINS AN ERROR BY THE ATTORNEYS WHICH THEY HAVE BEEN STRONGLY TOLD ABOUT AND ARE NOW IN THE PROCESS OF CORRECTING. ON BEHALF OF SHEA AND GOULD, MY APOLOGIES.

STEPHEN KIRSCHENBAUM, TRUSTEE

APPENDIX C

Letter from Appellant to Bankruptcy Court

January 5, 1982

Honorable Edward J. Ryan
United States Bankruptcy Judge
United States Courthouse
Foley Square
New York, New York

Re: Beck Industries, Inc. - Sale of Sloane Lease

Dear Judge Ryan:

On reviewing the application submitted to Your Honor in connection with this Court's Order dated December 24, 1981, I note that at paragraph 7 on page 3 there is a statement to the effect that the Trustee proposes to pay Mr. Rothberg 10% of the "net profit" realized on the sale of Sloane's inventory. In point of fact, the Trustee proposes to pay Mr. Rothberg 10% of the "gross proceeds" to be received by Sloane from such inventory liquidation, not 10% of Sloane's "net profit".

I appologize for any inconvenience to you in this regard.

Respectfully yours,

/s/ Lonn A. Trost

Lonn A. Trost

APPENDIX D

California Code of Civil Procedure
§ 418.10

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive

pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.